IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA:

RSA.No.132 of 1996.

Date of Decision :7th September, 2007.

Ludar and others.

…Appellants.

Versus:

Bihar Lal and others. …Respondents.

Coram:
The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1]

For the appellants: Mr.H.K.Bhardwaj, Advocate.

For Respondents. No.1 to 16. Mr.Anup Rattan, Advocate.

For Respondents Nos. 17 to 23 Mr.Rajinder Singh, Advocate.

Sanjay Karol, J (Oral).

The present appeal was admitted on the following substantial questions of law:

1. Whether the findings of the learned District Judge on adverse possession are correct or not specially in view of the proved ingredients decided in the learned trial court?.

2. Whether it is mandatory for the plaintiffs to allege and prove the adverse possession from a particular date or not?

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

3. Whether the learned District Judge mis-read and misinterpreted the documentary as well as oral evidence produced by the plaintiffs and its effect?

For the purpose of convenience, the appellants are referred to as the 'plaintiffs' and the respondents are referred to as the 'defendants'.

The plaintiffs and the defendants admittedly were the co-sharers in the suit land at some point in time. The plaintiffs filed a suit for declaration claiming ownership and possession of the suit land for the reason that the defendants who were once co-sharers had abandoned the property in question and had settled at another place which was also jointly owned by the parties. On the pleadings of the parties, the Court below framed the following issues:

1. Whether plaintiffs and proforma defendants 11 to 17 are exclusive owners in possession of the suit land as alleged? …OPD.

2.Whether suit is bad for non-joinder of necessary parties? …OPD.

3.Whether the plaintiffs' are estopped by their act and conduct to file the suit?. …OPD.

4.Whether the suit is barred by limitation? …OPD.

5.If issue No.1 is not proved, whether the plaintiffs and proforma defendants 11 to 17 have become owners defendant Nos. 1 to 10 by adverse possession as alleged? ….OPD.

After examining the statements of the witnesses as also the material on record, the trial Court came to the conclusion that even though the parties were co-sharers, however, because of long standing

possession of the plaintiffs, by adverse possession they had become owners of the suit land and therefore the plaintiffs were entitled to a declaration of decree as prayed for. The trial Court declared the plaintiffs to be owners in possession by way of adverse possession and the rights, title and interest of defendants No.1 to 10 in the suit land stand extinguished.

Aggrieved by the same, the defendants filed an appeal before the District Judge, Una which was registered as Civil Appeal No. 142 of 1992. The appellate Court reversed the finding of the trial Court and dismissed the suit filed by the plaintiffs which is now a subject matter of this appeal.

I have heard the learned counsel for the parties.Learned counsel for the plaintiffs has relied upon *M.Durai vs. Muthu and others*, (2007) 3 Supreme Court Cases 114 and *Smt. Samundra Devi Vs. Chand Singh and others*, AIR 1979 H.P. 24 which in my view do not help the case of the appellant.

Smt. Samundra Devi (supra), in my view, is in totally different set of facts. In this case the co-sharers were not only cultivating the joint property but also got the mutation recorded in the revenue record to the knowledge of all the villagers. The land owners neither bothered to get the said revenue entries corrected at any point in time nor visited the village claiming ownership of the same. In the present case, it has come on record that the parties were jointly holding the land at two places i.e. Bathu and Sarkaghat .

In *Durai Vs. Muthu and others* (2007) 3 Supreme Court Cases 114, the court in fact has held as under:

> "Yet again in T.Anjanappa Vs. Somalingappa this court opined as under: (SCC p.575 para 14).
> "14. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The person setting up adverse possession may have been holding under the rightful owner's title e.g. trustees, guardians, bailiffs or agents."
> It was furthermore held as under: (SCCp.577, para 20)
> "20. It is well-recognized proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action".

In *Karnataka Board of Wakf Vs. Government of India and others,* (2004) 10 Supreme Court Cases 779, the court has laid down the principle that the plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the

factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. A plaintiff, filing a title suit, should be very clear about the origin of title over the property. He must specifically plead it. The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Non-use of the property by the owner even for a long time won't affect his title.

In *P.T.Munichikkanna Reddy and others Vs. Revamma and others,* (2007) 6 Supreme Court Cases 59, the court has held as under:

> "Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile.
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> "To assess a claim of adverse possession, two-pronged enquiry is required:
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> 1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner is established. Successful application in this regard distances the title of the land from the owner of the property on paper.
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> 2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the owner of the property on paper, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

> Adverse possession is a right which comes into play not just because someone loses his right to reclaim the property out of continuous and willful neglect but also on account of possessor's positive intent to dispossess. Therefore it is important to take into account before stripping somebody of his lawful title, whether there is an adverse possessor worthy and exhibiting more urgent and genuine desire to dispossess and step into the shoes of the owner of the property on paper. This test forms the basis of decision in the instant case.
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> Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficed in a standard adverse possession case. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts the Limitation Act and it also assists the court to unearth the intention to dispossess"

In order to appreciate the controversy in issue, it is necessary to examine how the plea of adverse possession has been taken by the plaintiffs in the suit. In para-3 of the suit, it has been averred as under:

> "Even if at all the defendants 1 to 10 are proved to be an owners of the suit land in that event, the plaintiffs and defendants 11 to 17 have become owners of the suit land by way of adverse possession as there is complete ouster of defendants 1 to 10 and possession of the plaintiffs and proforma defendants 11 to 17 is open, hostile and un-interrupted"

The trial Court based on the pleadings as also the evidence on record returned the findings that the parties, undoubtedly were co-

sharers, but, however in view of the evidence which has come on record through DW-2 to the effect that they were residing in village Bhalan for the last 30 to 32 years, it could be inferred from their conduct that they had abandoned the property which was exclusively in possession of the plaintiffs who have thus become owners thereof. The first Appellate court however, while reversing the findings of the trial Court came to the conclusion that from the statement of plaintiff-Ludar (PW-1), it cannot be inferred at all, as to from which date the plaintiffs had been exclusively cultivating the land and that their possession was hostile to that of the defendants or that they have been cultivating the land to be exclusive owners thereof and had ousted the title of the defendants as such. From the statement of Krishan (PW-2) it is also clear that no evidence has been led to show as to from which date the plaintiffs have been claiming themselves to be the owners to the exclusion of the defendants.

There is material on record to show through the statements of the parties that Ext.D-1/A,B and C which are the copies of the Jamabandi of the land for the year 1979-80, Ext.D-1/D copy of Khasra Girdawari and Ext.D-1/E copy of Aks Shajra (Revenue Records of Title) to show that the land in question was jointly held by the parties. Further through Ext.D-1/F to D-1/H which are copies of the jamabandies (revenue record) (1979-80) of the land in another village Sarkaghat, it is clear that the parties were also possessing the said land jointly. PW-1 has admitted in his examination that a part of his land was sold in village Sarkaghat. Thus, from the material on record it cannot be said that the plaintiffs were possessing the land exclusively and to the exclusion the defendants who admittedly were co-sharers at some point in time. There is no mention of the starting point of adverse possession. Learned counsel for the plaintiffs

has drawn my attention to Ext.P-1 which is the copy of the jamabandi (revenue record) for the period of 1979-80 showing the plaintiffs in exclusive possession on the suit land. Even this document shows the defendants to be co-owners of the suit land. Therefore, merely possessing the land by the plaintiffs in itself not give any right to them to claim title of the same. Learned counsel for the plaintiffs has submitted that the plaintiffs are in cultivating possession of the suit land. The submission that the defendants have not been receiving any profits from the property therefore plaintiffs have become owners cannot be accepted. There was no intention of the defendants to abandon the title.

The questions of law are answered accordingly.

The findings of the first appellate Court are based on cogent material and correct appreciation of facts and law. I see no infirmity, illegality or perversity in the judgment passed by the first appellate Court and the appeal is accordingly dismissed.

(Sanjay Karol),
Judge.

September 7, 2007(R)